

FINAL AWARD ALLOWING COMPENSATION
(Modifying Award and Decision of Administrative Law Judge)

Injury No.: 03-057789

Employee: Patricia Wyatt-Baucom
Employer: SSM/St. Mary's Health Center (Settled)
Insurer: Self-Insured (Settled)
Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

This workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. We have reviewed the evidence, read the parties' briefs, heard the parties' arguments, and considered the whole record. Pursuant to § 286.090 RSMo, we modify the award and decision of the administrative law judge. We adopt the findings, conclusions, decision, and award of the administrative law judge to the extent that they are not inconsistent with the findings, conclusions, decision, and modifications set forth below.

Preliminaries

The parties asked the administrative law judge to determine the sole issue of Second Injury Fund liability.

The administrative law judge determined that employee failed to meet her burden of proving the Second Injury Fund is liable for permanent total disability benefits, and determined instead that employee is entitled to 15.48 weeks of permanent partial disability benefits from the Second Injury Fund.

Employee filed a timely Application for Review with the Commission alleging the administrative law judge erred in finding the Second Injury Fund is not liable for permanent total disability benefits

For the reasons stated below, we modify the award of the administrative law judge referable to the issue of Second Injury Fund liability.

Discussion

Preexisting conditions of ill-being

At the time of the primary injury on June 16, 2003, employee was suffering from a number of preexisting injuries and disabling conditions of ill-being.

In October 1990, employee suffered a back injury which took her out of work for about 5 months; employee settled a claim against her employer of 5% permanent partial disability of the body as a whole referable to the low back. In 1992, employee suffered another back injury which took her out of work for about 3 months; employee settled a claim against her employer for 14.5% permanent partial disability of the body as a whole referable to the low back. In 1994, employee suffered back, right hip, and left wrist injuries which took her out of work for about 3 months; employee settled a claim against

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her employer for 6.5% permanent partial disability of the body as a whole. In 2002, employee suffered another low back injury; employee settled a claim against her employer for 2.5% permanent partial disability of the body as a whole referable to the low back. After the 2002 low back injury, employee was unable to continue her work as a certified nursing assistant, and so transferred to an essentially sedentary clerical position. We find that, at the time of the primary injury, employee suffered a 30% permanent partial disability of the body as a whole referable to her low back.

The primary injury

On June 16, 2003, employer asked employee to assist in moving a patient. Employee complied, despite the fact she was working in a light duty clerical position owing to her numerous prior back injuries. In the course of this activity, employee suffered a serious left shoulder injury as well as severe aggravation of her low back condition. Employee settled a claim against employer for 15% permanent partial disability of the left shoulder.

Dr. Volarich opined that as a result of the primary injury, employee suffered (1) a lumbosacral strain or sprain and aggravation of her preexisting lumbar syndrome including disc protrusion at L3-4 and annular tear at L4-5 without radicular symptoms and (2) a left shoulder traction injury resulting in adhesive capsulitis. We find Dr. Volarich's essentially uncontested expert medical opinion persuasive on this point, and adopt as our own his findings with respect to the pathology resulting from the primary injury. Absent direction or citation to the contrary, we also adopt Dr. Volarich's opinion, stated in his report of May 18, 2007, that employee had reached maximum medical improvement as of that date.

We acknowledge the settlement with employer, but we find that the nature and extent of disability reflected therein does not adequately account for the full measure of disability employee suffered as a result of the multiple injuries to her low back and left shoulder. We find that, as a result of the primary injury, employee suffered a 35% permanent partial disability of the body as a whole.

Permanent total disability

The administrative law judge concluded that employee failed to meet her burden of proof with respect to the issue of permanent total disability based, in part, on a determination that employee's vocational expert, Wilbur Swearingin, improperly included post-accident conditions (including a 2010 left ankle fracture resulting in a need for a wheelchair) in his opinion that employee is permanently and totally disabled. In their briefs, the parties have provided very different versions of Mr. Swearingin's opinions, and so we have conducted an exhaustive review of Mr. Swearingin's report and testimony.

After careful consideration, we are not persuaded that Mr. Swearingin included post-accident worsening of employee's condition in his opinion regarding permanent total disability. This is because Mr. Swearingin's report specifically states that he did not consider employee's subsequent ankle fracture (necessitating her use of a wheelchair) or hip replacement in reaching his opinions. See *Transcript*, page 3812. The Second Injury Fund's citations to the contrary simply show the vocational expert agreeing (quite reasonably) that employee's use of a wheelchair will not help her find jobs, but do not

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suggest that Mr. Swearingin has included employee's post-accident worsening or wheelchair use in his ultimate opinions regarding permanent total disability.

We note that Mr. Swearingin did frame his ultimate opinion regarding employee's permanent total disability as involving a combination of employee's preexisting conditions and a left index finger injury that occurred in 2004 after the primary injury, but Mr. Swearingin also indicated that his opinion that employee is permanently and totally disabled turns on the physical restrictions identified by Dr. Volarich and employee's treating physician, Dr. Allison Fischer. We note that neither of those doctors identified any physical restriction as stemming from the 2004 finger injury. Dr. Volarich specifically opined that "limitations are not necessary" referable to the 2004 finger injury, other than that employee should protect the tip of her finger from additional trauma. *Transcript*, page 3740. In other words, although Mr. Swearingin cited the 2004 left index finger injury in his ultimate opinions, it appears that the finger injury played no role in his actual vocational analysis.

The Second Injury Fund argues that Mr. Swearingin specifically testified that employee was not permanently and totally disabled until after she suffered the 2004 left finger laceration. The relevant exchange between counsel for the Second Injury Fund and Mr. Swearingin on this point is, as follows:

- Q. On the day she was injured in 2004, it would still be your opinion that she could work, correct?
- A. Well, she was working on that day, so I think – yeah, I think that's pretty good evidence in itself.

Transcript, page 3786.

We do not read the foregoing testimony as an opinion by Mr. Swearingin that employee was not permanently and totally disabled until after the 2004 left finger laceration injury. Nor do we find that such an opinion would be supported in the record. Employer laid employee off in August 2003 while she was recovering following the primary injury. On September 14, 2004, employee took a job as a cook with another employer, which lasted only 1.5 days. Employee was unable to complete her first assignment, which was to carry gallon jugs of milk up a flight of stairs; employee's back hurt so badly after carrying a single jug that she sought help from a coworker who completed the job for her. The next day, employee cut her finger, and did not return to work. Having worked a mere 1.5 days, employee's physical ability to perform this job was untested and dubious at best. More importantly, as Dr. Volarich credibly opined (and we so find) the demands of this job as described by employee are incompatible with the permanent restrictions he imposed. We do not believe the 2004 injury is a significant or essential factor causing or contributing to employee's permanent total disability.

It is essentially uncontested that before the primary injury of June 2003, employee was limited to sedentary work owing to her preexisting low back injuries and disabling conditions. We have found that as a result of the primary injury, employee suffered considerable additional permanent partial disability referable to the low back and left

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shoulder. We wish to make clear that this record provides competent and substantial evidence to support the result reached by the administrative law judge. But when we consider the evidence regarding employee's inability to perform the normal duties of the 2004 job, combined with Mr. Swearingin's testimony relying upon the restrictions from Drs. Volarich and Fischer, we are convinced that employee is permanently and totally disabled owing to a combination of the June 2003 primary injury and her numerous preexisting injuries and disabling conditions of ill-being, and we so find.

Second Injury Fund liability

Section 287.220 RSMo creates the Second Injury Fund and provides when and what compensation shall be paid in "all cases of permanent disability where there has been previous disability." As a preliminary matter, the employee must show that she suffers from "a preexisting permanent partial disability whether from compensable injury or otherwise, of such seriousness as to constitute a hindrance or obstacle to employment or to obtaining reemployment if the employee becomes unemployed..." *Id.* The Missouri courts have articulated the following test for determining whether a preexisting disability constitutes a "hindrance or obstacle to employment":

[T]he proper focus of the inquiry is not on the extent to which the condition has caused difficulty in the past; it is on the potential that the condition may combine with a work-related injury in the future so as to cause a greater degree of disability than would have resulted in the absence of the condition.

Knisley v. Charleswood Corp., 211 S.W.3d 629, 637 (Mo. App. 2007)(citation omitted).

We have found that employee suffered from numerous preexisting permanent partially disabling injuries and conditions referable to her low back at the time she sustained the work injury. We are convinced these conditions were serious enough to constitute hindrances or obstacles to employment. This is because we are convinced employee's preexisting conditions had the potential to combine with a future work injury to result in worse disability than would have resulted in the absence of her preexisting conditions. See *Wuebbeling v. West County Drywall*, 898 S.W.2d 615, 620 (Mo. App. 1995).

Having found that employee suffered from preexisting permanent partially disabling conditions that amounted to hindrances or obstacles to employment, we turn to the question whether the Second Injury Fund is liable for permanent total disability benefits. In order to prove her entitlement to such an award, employee must establish that: (1) she suffered a permanent partial disability as a result of the last compensable injury; and (2) that disability has combined with a prior permanent partial disability to result in total permanent disability. *ABB Power T & D Co. v. Kempker*, 236 S.W.3d 43, 50 (Mo. App. 2007). Section 287.220.1 requires us to first determine the compensation liability of the employer for the last injury, considered alone. If employee is permanently and totally disabled due to the last injury considered in isolation, the employer, not the Second Injury Fund, is responsible for the entire amount of compensation. "Pre-existing disabilities are irrelevant until the employer's liability for the last injury is determined." *Landman v. Ice Cream Specialties, Inc.*, 107 S.W.3d 240, 248 (Mo. 2003).

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We have determined that, as a result of the accident on June 16, 2003, employee sustained a 35% permanent partial disability of the body as a whole. We conclude that employee is not permanently and totally disabled as a result of the last injury considered in isolation.

We conclude employee is permanently and totally disabled owing to a combination of her preexisting disabling conditions in combination with the effects of the work injury. The Second Injury Fund is liable for permanent total disability benefits.

Conclusion

We modify the award of the administrative law judge as to the issue of Second Injury Fund liability.

The Second Injury Fund is liable for weekly permanent total disability benefits beginning May 18, 2007, at the differential rate of \$145.79 for 140 weeks, and thereafter at the stipulated weekly permanent total disability rate of \$437.36. The weekly payments shall continue for employee's lifetime, or until modified by law.

The award and decision of Administrative Law Judge Hannelore D. Fischer, issued November 13, 2013, is attached hereto and incorporated herein to the extent not inconsistent with this decision and award.

The Commission approves and affirms the administrative law judge's allowance of an attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 3rd day of June 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

DISSENTING OPINION FILED
James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

Employee: Patricia Wyatt-Baucom

DISSENTING OPINION

Based on my review of the evidence as well as my consideration of the relevant provisions of the Missouri Workers' Compensation Law, I believe the Commission should affirm the award of the administrative law judge and award permanent partial rather than permanent total disability benefits to this employee.

I disagree with the majority's reading of Mr. Swearingin's opinion regarding permanent total disability. I believe Mr. Swearingin persuasively opined that employee was not permanently and totally disabled until after the 2004 left index finger injury.

The test for permanent total disability is whether the worker is able to compete in the open labor market. The critical question is whether, in the ordinary course of business, any employer reasonably would be expected to hire the injured worker, given his present physical condition.

Molder v. Mo. State Treasurer, 342 S.W.3d 406, 411 (Mo. App. 2011)(citation omitted).

As Mr. Swearingin stated in the quote set forth in the majority's opinion, employee was working on the day that she sustained the 2004 injury. Employee thus had proven her ability to compete for work in the open labor market after the 2003 primary injury by the very fact that she had successfully obtained the job as a cook. By focusing on employee's inability to perform the duties of the 2004 job rather than employee's *uncontested* ability to successfully compete for and secure that job in the open labor market, I believe the majority overlooks the appropriate test for permanent total disability.

I additionally wish to draw attention to the fact that employee's counsel made the strategic choice to dismiss, on the date of trial, the 2004 claim for compensation against the Second Injury Fund, despite the fact employee had procured expert opinions that included the 2004 injury as a component of employee's purported combination total disability. The considerations leading up to this strategic choice do not appear of record, but the result is clear. Instead of treating the 2004 injury as the last or "primary" injury, we must evaluate the evidence as if the 2003 injury is the last injury, despite the fact that none of the experts in this case did so. How does employee expect to make her case for permanent total disability after taking such a step? By asking us to ignore the *actual* opinions of her own experts, in favor of the strained analysis she advances. To me, this seems to constitute an invitation to improperly substitute our own lay opinions for those of the experts. I disagree with the choice to reward employee and her counsel for putting the fact-finder in such a position, and I believe we should read Mr. Swearingin's testimony to mean exactly what it says: that employee is not permanently and totally disabled unless the 2004 injury is included in the analysis.

In sum, I believe the administrative law judge appropriately evaluated the evidence and reached the correct result. I would affirm the award of the administrative law judge without modification. Because the majority has determined otherwise, I respectfully dissent.

James G. Avery, Jr., Member

AWARD

Employee: Patricia Wyatt-Baucom Injury No.: 03-057789

Dependents: N/A

Employer: SSM/St. Mary's Health Center (previously settled)

Additional Party: Treasurer of the State of Missouri,
Custodian of the Second Injury Fund

Insurer: N/A

Hearing Date: October 9, 2013

Before the
**DIVISION OF WORKERS'
COMPENSATION**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Checked by: HDF/scb

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: June 16, 2003
5. State location where accident occurred or occupational disease was contracted: Cole County, Missouri
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? N/A
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
See award
12. Did accident or occupational disease cause death? No Date of death? N/A
13. Part(s) of body injured by accident or occupational disease: Left shoulder, low back
14. Nature and extent of any permanent disability: 15% left shoulder
15. Compensation paid to-date for temporary disability: ----
16. Value necessary medical aid paid to date by employer/insurer? ----

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- 17. Value necessary medical aid not furnished by employer/insurer? ----
- 18. Employee's average weekly wages: ----
- 19. Weekly compensation rate: \$437.36 for temporary total disability benefits
\$291.57 for permanent partial disability benefits
- 20. Method wages computation: By agreement

COMPENSATION PAYABLE

- 21. Amount of compensation payable: Employer previously settled
- 22. Second Injury Fund liability: Yes. 3.87%
15.48 weeks of permanent partial disability from Second Injury Fund = \$4,513.50
- 23. Future Requirements Awarded: None

Said payments to begin immediately and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 25% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Paul Seigfreid.

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FINDINGS OF FACT and RULINGS OF LAW:

Employee: Patricia Wyatt-Baucom

Injury No: 03-057789

Dependents: N/A

Before the
**DIVISION OF WORKERS'
COMPENSATION**

Employer: SSM/St. Mary's Health Center (previously settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Treasurer of the State of Missouri,
Custodian of the Second Injury Fund

Insurer: N/A

Checked by: HDF/scb

The above-referenced workers' compensation claim was heard before the undersigned administrative law judge on October 9, 2013. Memoranda were submitted by November 1, 2013.

The parties stipulated that on or about June 16, 2003, the claimant, Patricia Wyatt-Baucom (Baucom), was in the employment of SSM/St. Mary's Health Center (St. Mary's). The parties stipulated that all facts relevant to the claimant's relationship with her employer are resolved in the claimant's favor in her pending claim against the Second Injury Fund. The compensation rate \$437.36 per week for temporary and permanent total disability benefits and \$291.57 per week for permanent partial disability benefits.

The parties stipulated that the claim against the employer/insurer settled based on a permanent disability of 15 percent of the left shoulder; the parties did not, however, agree that this reflects the extent of permanent disability resulting from the injury of June 16, 2003, in the pending claim against the Second Injury Fund. Similarly, the parties stipulated to prior workers' compensation settlements, including a 1990 injury, Injury Number 90-138446, which settled based on a permanent disability of five percent of the body referable to the low back; a 1992 injury, Injury Number 92-34929 (employer—Bothwell Hospital), which settled based on a permanent disability of 14.5 percent of the body referable to the low back; a 1994 injury, Injury Number 94-130867 (employer—Wal-Mart), which settled based on a permanent disability of 6.5 percent of the body referable to the low back, the right hip, and the left wrist; and a 2002 injury, Injury Number 02-52666 (employer—St. Mary's), which settled based on a permanent disability of 2.5 percent of the body referable to the low back. The parties did not agree that the percentages of disability noted in the settlements reflect the extent of permanent disability resulting from these settlements in the pending claim against the Second Injury Fund.

The issue to be resolved as the result of this hearing is the liability of the Second Injury Fund (permanent total disability is alleged).

At the inception of the hearing in this case, a companion claim against the Second Injury Fund, Injury No. 04.95178, was dismissed.

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Subsequent to the hearing of this case claimant's counsel withdrew two additional exhibits, Exhibits 15 and 16, from consideration as part of the evidence in this proceeding.

FACTS

The claimant, Patricia Wyatt-Baucom (Baucom), was born in 1963. Ms. Baucom was injured while working for SSM/St. Mary's Health Center (St. Mary's) on June 16, 2003, when she was assisting in moving a patient in bed and injured her left shoulder and low back. At that time Ms. Baucom was employed by St. Mary's as a clerical associate, but had been asked to help on the floor as a CNA, which is what Ms. Baucom did when she was initially employed with St. Mary's. Ms. Baucom became a clerical associate after a back injury at St. Mary's in 2002. In August of 2003, prior to her return to work from the June 2003 back injury, Ms. Baucom lost her position as a clerical assistant at St. Mary's when her position was eliminated as the result of a downsizing effort.

In September of 2004, Ms. Baucom had just begun employment as a cook with the Stuart House when she cut her left index finger with a serrated knife. Ms. Baucom testified that she did not return to work after the index finger injury and has not been employed since. Ms. Baucom also had a left brachial artery repair shortly after the September 2004 finger laceration.

In addition, since the June 2003 injury, Ms. Baucom fractured her ankle in 2010, causing her to be wheelchair bound, had a full hip replacement in 2011, fractured her left index finger in a March 2011 fall, and had congestive heart failure in 2006 causing her to need extensive treatment, including a heart bypass surgery, and the placement of two stints and a defibrillator.

Ms. Baucom also noted diabetes, depression, and irritable bowel syndrome as conditions she suffered from prior to 2003.

Ms. Baucom testified that after her September of 2004 finger injury, she applied for a position as a "psyche tech" but did not accept the position because it called for night shifts and Ms. Baucom and her husband have only one vehicle, and that she applied for a child care position but was not offered that position. Ms. Baucom testified that she needs assistance with activities of daily living such as dressing herself and that her need for assistance arose in 2006 after she suffered a frozen left shoulder.

Ms. Baucom testified that she was able to perform her clerical duties at St. Mary's and was happy in that position.

Dr. David Volarich evaluated Ms. Baucom on May 18, 2007, and generated a report pertaining thereto on the same date. Dr. Volarich opined that as a result of the June 16, 2003 accident that Ms. Baucom had a permanent disability of 20 percent of the body referable to the back as well as a 25 percent disability of the left shoulder. Dr. Volarich opined that preexisting the June 16, 2003 accident that Ms. Baucom had a five percent disability of the body referable to the lumbar spine as the result of a May 26, 2002 accident and a 30 percent disability of the low back referable to

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the low back preexisting May 26, 2002. Dr. Volarich opined that the combination of Ms. Baucom's disabilities created a substantially greater disability than their simple sum.

Wilbur Swearingin, rehabilitation consultant, evaluated Ms. Baucom on July 12, 2011, and authored a report pertaining thereto on August 31, 2011. Mr. Swearingin opined that Ms. Baucom is permanently and totally disabled as the result of her September 2004 left finger injury in combination with her preexisting disabilities. Mr. Swearingin specifically stated in his deposition testimony that he believed Ms. Baucom was able to work as of the date of her 2004 finger injury. In addition, Mr. Swearingin specifically mentioned Ms. Baucom's use of a wheel chair as placing her "minimally at a sedentary exertional level." (Swearingin depo p31) When asked about Ms. Baucom's ability to perform certain jobs, Mr. Swearingin agreed that "You don't see any carhops in wheelchairs". (Swearingin depo p35) Mr. Swearingin went on to say that Ms. Baucom's "mobility is a problem. That's why the wheelchair." (Swearingin depo p35) In coming to the conclusion that Ms. Baucom has no placement potential in the work force, Mr. Swearingin relied on Ms. Baucom's eight year absence from the work force, her phobia causing it to be difficult to leave her house, her wheelchair confinement, her minimal mobility, her depression, and her difficulty functioning with her left arm.

APPLICABLE LAW

RSMo Section 287.220.1. There is hereby created in the state treasury a special fund to be known as the "Second Injury Fund" created exclusively for the purposes as in this section provided and for special weekly benefits in rehabilitation cases as provided in section 287.141. Maintenance of the second injury fund shall be as provided by section 287.710. The state treasurer shall be the custodian of the second injury fund which shall be deposited the same as are state funds and any interest accruing thereon shall be added thereto. The fund shall be subject to audit the same as state funds and accounts and shall be protected by the general bond given by the state treasurer. Upon the requisition of the director of the division of workers' compensation, warrants on the state treasurer for the payment of all amounts payable for compensation and benefits out of the second injury fund shall be issued.

AWARD

The claimant, Patricia Baucom, has failed to sustain her burden of proof that she is permanently and totally disabled as the result of her accident and injuries of June 16, 2003, and her preexisting disabilities. Dr. Volarich evaluated Ms. Baucom in 2007 and noted that the combination of her disabilities both from the 2003 accident and those preexisting exceed their simple sum. Mr. Swearingin found Ms. Baucom to be permanently and totally disabled from a vocational standpoint in 2011; however, Mr. Swearingin relied on Ms. Baucom's wheelchair bound status in reaching his conclusion that Ms. Baucom is permanently and totally disabled. Where Ms. Baucom testified that she did not use a wheelchair until 2010 after an ankle fracture, Mr. Swearingin's conclusions are accorded little to no weight. Moreover, Mr. Swearingin found Ms. Baucom to be employable in 2004 when she sustained her finger injury, after the June 16, 2003 accident giving rise to this claim for permanent and total disability benefits; this finding

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again is relevant to the weight given Mr. Swearingin's opinion regarding permanent and total disability in this case.

However, Ms. Baucom has sustained her burden of proof that the Second Injury Fund is liable for permanent partial disability as the result of the combination of the left shoulder injury of June 16, 2003, and her preexisting injury to the low back. Ms. Baucom has proven that the left shoulder injury of June 16, 2003, and her preexisting low back injury are each serious enough to cause a hindrance or obstacle to employment. The disability imposed on Ms. Baucom by her left shoulder injury of June 16, 2003, is 15 percent of the left shoulder based on Ms. Baucom's testimony regarding her injury and the limitations imposed by it as well as the opinion of Dr. Volarich. The disability imposed on Ms. Baucom by her preexisting disability is found to be 30 percent of the body referable to the low back based on Ms. Baucom's testimony regarding the limitations imposed on her by her low back injury as well as the opinion of Dr. Volarich. The synergistic effect or disability above and beyond the simple sum of the disability to the left shoulder from the injury of June 16, 2003, and the preexisting disability to her low back is 3.87 percent of the body.

Made by: _____
HANNELORE D. FISCHER
Administrative Law Judge
Division of Workers' Compensation